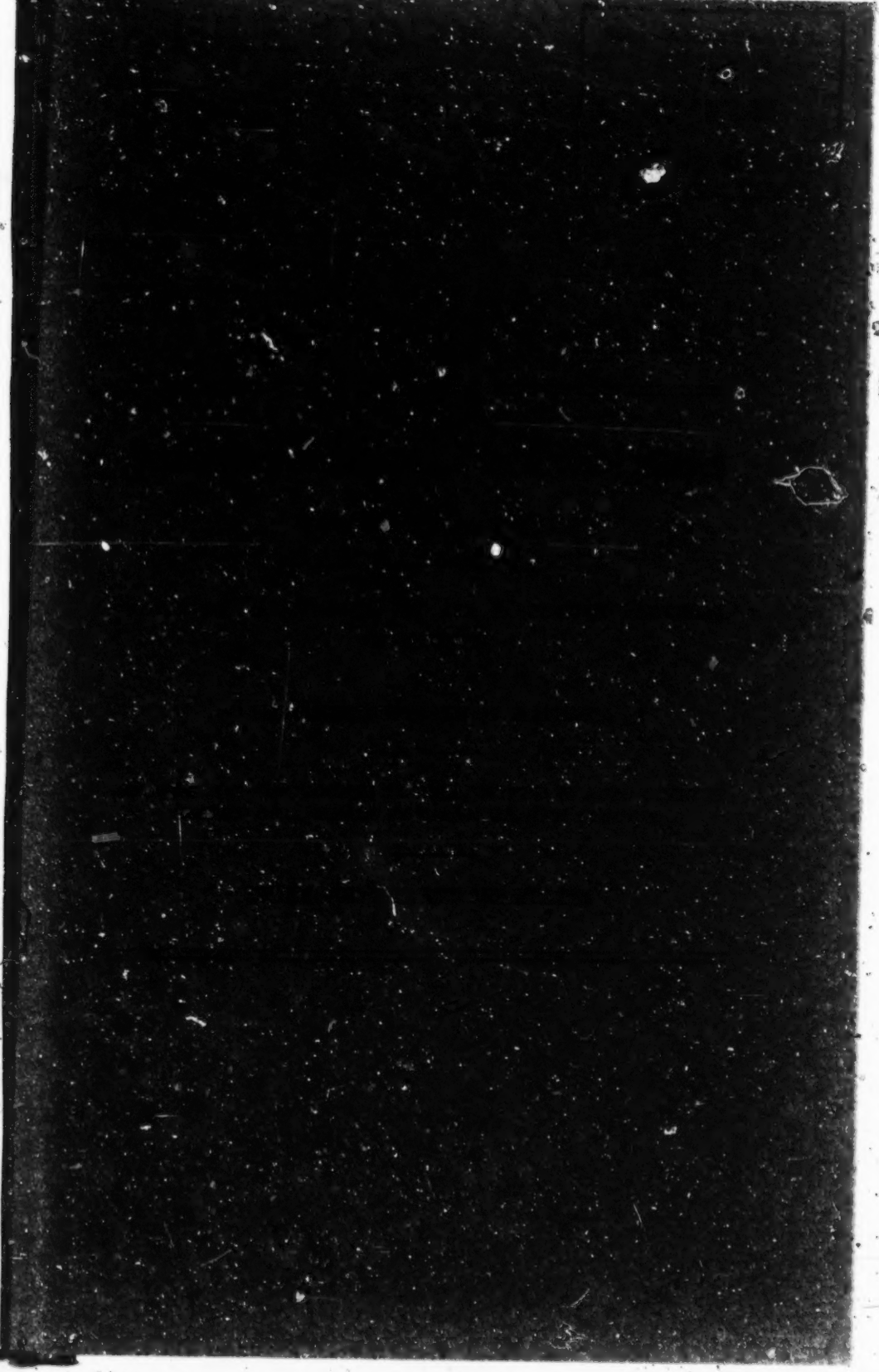

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 73

STATE OF MINNESOTA, BY ITS ATTORNEY GENERAL
PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court did not write an opinion. Its order appears at R. 55–66. The opinion of the Circuit Court of Appeals (R. 81) is reported at 95 F. (2d) 468.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on March 12, 1938 (R. 89). Petition for certiorari was filed on May 31, 1938, and was granted October 10, 1938. The jurisdiction of this Court rests on Section 240

(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a State can condemn for a highway, without the consent of the United States, lands which the United States holds in trust for Indian allottees or for an Indian tribe.

2. Whether the Act of March 3, 1901 (31 Stat. 1058, 1084), consents to the condemnation of Indian allotments, for highway purposes, without the permission of the Secretary of the Interior; paragraph 2 of Section 3 of that Act providing that allotted Indian lands may be condemned for any public purpose under the laws of the State, and Section 4 thereof providing that the Secretary of the Interior may grant permission to state authorities for the opening of highways in accordance with the laws of the State through tribal and allotted Indian lands.

3. Whether the Act of March 3, 1901, consents that a proceeding to condemn Indian allotments may be brought in a state court, although it does not specifically eliminate the necessity of joining the United States in such a proceeding or consent that it be sued in a state court.

4. Whether the Act of March 3, 1901, insofar as it dealt with the condemnation of Indian lands, was repealed by the Indian Reorganization Act (48 Stat. 984), Section 4 of which prohibits any transfer of Indian lands except as provided in that Act,

and Section 3 of which provides that nothing therein contained shall restrict the granting of permits for rights of way.

5. Whether the petitioner is authorized to take the lands here sought by a provision of the Treaty of September 30, 1854 (10 Stat. 1109), between the United States and the Chippewa Indians that all necessary roads shall have the right of way through the tracts reserved by the treaty to the Indians; and whether that provision has been superseded (1) by the Act of January 14, 1889 (25 Stat. 642), which provided for the cession to the United States of the reservation in which the lands here involved were located, reserving to individual Indians who so chose the right to take allotments on the ceded reservation, (2) by the Act of March 3, 1901, or (3) by the Indian Reorganization Act.

6. Whether the United States had power, by purchasing an Indian allotment in trust for an Indian tribe, to revoke any consent it had given to the condemnation of the allotment, after the petitioner had initiated condemnation proceedings and had filed a notice of *lis pendens,* but before title had passed.

TREATY AND STATUTES INVOLVED

There is set forth in the Appendix the treaty and statutes primarily involved: Treaty of September 30, 1854 (10 Stat. 1109); Act of March 3, 1901 (31 Stat. 1058); Indian Reorganization Act (Act of June 18, 1934, 48 Stat. 984).

STATEMENT

The State of Minnesota filed a petition February 6, 1936, in a Minnesota district court for the condemnation of nine described tracts of land for highway purposes (R. 1). The petition recited that the United States held the fee of each tract in trust, and that various named individuals were the owners under Indian allotments (R. 3–11). The United States of America was named as a party defendant (R. 1), and notice was served upon the United States Attorney R. 21–22).

The United States removed the case to the Federal district court (R. 24–25).

On the hearing of the case the State presented its petition in condemnation (R. 38); called the court's attention to the fact that notice of *lis pendens* had been recorded on February 8, 1936 (R. 38); and introduced in evidence copies of three orders of the Minnesota commissioner of highways locating the right of way of the highway for which the lands are sought (R. 38–45). The State then rested and moved for the allowance of the petition and for the appointment of appraisers (R. 45). There was no showing that the State had obtained the permission of the Secretary of the Interior to build the highway across the Indian allotments or to institute this condemnation proceeding.

The United States appeared specially and moved that the action be dismissed because it was against the United States and the United States had not

consented to it (R. 45–46). The United States made a second motion that the action be dismissed with particular reference to Parcel 5 on the same grounds (R. 46). The petition had stated that Paul Quodonce was the owner of Parcel No. 5 under an Indian allotment, and that the United States was the holder of the fee in trust (R. 3). In support of the motion to dismiss as to Parcel 5, the United States introduced in evidence a copy of an option, given by Quodonce on January 22, 1936, and accepted by the United States on February 20, 1936, for the purchase of certain land by the United States from Quodonce (R. 46–52), and a copy of a deed, dated March 2, 1936, for the land from Quodonce to the United States in trust for the Grand Portage Band of Chippewa Indians (R. 53–55). The option recites that it is given "to assist in the program of the United States to acquire lands under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), for Indian purposes * * *" (R. 47). Comparison of the option (R. 47) and deed (R. 53) with the petition (R. 3) shows that the land conveyed included all of the tract described in the petition as Parcel 5.

The District Court found that the United States had consented that this proceeding be brought against the allottees by paragraph 2 of Section 3 of the Act of March 3, 1901, 31 Stat. 1058, 1084, and that the United States was, accordingly, not a necessary party (R. 57); and that the conveyance of

Parcel 5 by Quodonce to the United States in trust for the Grand Portage Band of Chippewa Indians was made subsequent to the filing of a notice of *lis pendens* by the State, and did not affect the right of the State to proceed in this action (R. 65). The motions of the United States were therefore denied (R. 56).

On appeal by the United States, the Circuit Court of Appeals for the Eighth Circuit reversed, with directions to dismiss (R. 88). It held that the State could not maintain this suit against the United States without the consent of the United States, and that since the Secretary of the Interior had not first given his permission for this proceeding, the United States had not consented by the Act of March 3, 1901 (R. 81–88).

SUMMARY OF ARGUMENT

A State cannot, without the consent of the United States, condemn lands which the United States holds in trust for Indian allottees or for an Indian tribe. In the first place, even a State cannot sue the United States without the consent of the latter, *Kansas* v. *United States,* 204 U. S. 331, 342–343, and a suit against property of the United States is a suit against the United States, and so cannot be maintained without its consent. *Carr* v. *United States,* 98 U. S. 433, 437–439; *Stanley* v. *Schwalby,* 147 U. S. 508, 512. In the second place, no State has the substantive power to acquire property of the United States without the latter's consent.

Utah Power & Light Co. v. *United States*, 243 U. S. 389, 404–405; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 650.

The United States has not authorized the condemnation of Indian allotments for highway purposes without the permission of the Secretary of the Interior. The provision in paragraph 2 of Section 3 of the Act of March 3, 1901 (31 Stat. 1058), largely relied upon by the petitioner (Br. 11–32), that Indian allotments "may be condemned for any public purpose under the laws of the State," must be viewed as qualified, as regards condemnation for highways, by the provision of Section 4 of that Act authorizing the Secretary of the Interior to grant permission to state authorities "for the opening * * * of public highways, in accordance with the laws of the State * * *." The latter provision plainly covers the opening of highways by condemnation and permits such opening only with the permission of the Secretary: if paragraph 2 of Section 3 were interpreted as dispensing with that consent the statute would be self-contradictory.

Even if the Act of March 3, 1901, consented unconditionally to the condemnation of Indian allotments, the condemnation proceeding could be brought only in Federal court. The United States is an indispensable party to the proceeding unless the Act of March 3, 1901, provides otherwise. *Bowling* v. *United States*, 233 U. S. 528, 534–535.

That Act does not expressly eliminate the necessity that the United States be made a party, and such a provision cannot be implied, since it would violate the duty owed by the United States to its Indian wards to protect and represent their interests—a duty which has been consistently recognized by this Court and by Congress. See *Heckman* v. *United States*, 224 U. S. 413, 444; *McKay* v. *Kalyton*, 204 U. S. 458, 469. Since the United States must be made a party to a suit under the Act of March 3, 1901, for the condemnation of Indian allotments, the suit can be brought only in Federal court. The Act does not provide in what forum suit is to be brought, and statutes consenting to suit against the United States are strictly construed, *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, 686, and should not, in the absence of express language, be interpreted as consenting to suit in state courts. Compare *Stanley* v. *Schwalby*, 162 U. S. 255, 270.

In any event, the Act of March 3, 1901, insofar as it dealt with the condemnation of Indian lands, was repealed by the Indian Reorganization Act (48 Stat. 984). Section 4 of that Act provides: "Except as herein provided, no * * * transfer of restricted Indian lands * * * shall be made or appproved: * * *." Any doubt that this section repeals the condemnation provisions of the Act of March 3, 1901, is resolved by the proviso in Section 3 of the Indian Reorganization Act that "Nothing

herein contained shall restrict the granting or use of permits for easements or rights-of-way." This explicit preservation of one method by which rights of way across Indian lands may be acquired plainly indicates that no other method was meant to survive.

The petitioner also cites (Br. 33–36), as authorizing this proceeding, a provision in the Treaty of September 30, 1854 (10 Stat. 1109), between the United States and the Chippewa Indians, to the effect that necessary roads shall have the right of way through the tracts reserved to the Indians. There are several reasons why this provision has no application here: (1) The treaty dealt only with rights between the Indians and the United States; it did not grant to the petitioner or to private interests rights against both. (2) The treaty was superseded, as regards the Grand Portage Reservation (in which the lands here involved are situated) by the Act of January 14, 1889 (25 Stat. 642), which provided for the cession of that reservation to the United States, individual Indians to have the right to choose allotments there. (3) If the treaty provision ever had any pertinence to the right of the petitioner to condemn, and if it was not repealed by the Act of January 14, 1889, it clearly was repealed by the Act of March 3, 1901, regardless of whether that Act be construed as urged by the petitioner or as urged by the Government. (4) If the treaty provision had not there-

tofore been repealed by implication, it was repealed by the Indian Reorganization Act.

Finally, whatever view may be taken as to the right of the petitioner to condemn the eight tracts of land which are held in trust for individual Indians, in no event can it condemn the remaining tract—Parcel 5—which is held in trust for an Indian tribe. It has never been suggested that the United States has consented to the condemnation of Indian tribal land. While it is true that Parcel 5 was held in trust for an individual Indian when this condemnation proceeding was filed, and was thereafter purchased by the United States in trust for the tribe, the United States had power to withdraw its consent that the allotment be condemned at any time before the State actually acquired title. *Lynch* v. *United States*, 292 U. S. 571, 581–582; *The Yosemite Valley Case*, 15 Wall. 77, 87.

ARGUMENT

I

A STATE HAS NO POWER, WITHOUT THE CONSENT OF THE UNITED STATES, TO CONDEMN LANDS WHICH THE UNITED STATES HOLDS IN TRUST FOR INDIAN ALLOTTEES OR FOR AN INDIAN TRIBE

The petitioner urges (Br. 36–42) that a State has power to condemn lands of the United States, regardless of the consent of the latter, for a use which is "supreme or paramount" to the use being made of the lands by the United States. The petitioner

does not challenge the power of the United States to hold lands in trust for Indian allottees or an Indian tribe,[1] or assert that lands so held are subject to state power to a greater extent than are other lands held by the United States, but argues generally that lands held by the United States "should be subject to the power of eminent domain of the State to the same extent as lands used for one public purpose may be acquired for another public or greater purpose where such added use would not be inconsistent with or defeat the first purpose" (Br. 42).

The initial fallacy in the contention of the petitioner is that a suit to condemn lands of the United States is a suit against the United States, and cannot be maintained without the consent of Congress. Even a State cannot sue the United States without the consent of the latter. *Kansas* v. *United States*, 204 U. S. 331, 342, 343; *Arizona* v. *California*, 298 U. S. 558, 568. And it is well settled that a suit against property of the United States is a suit against the United States, and so cannot be maintained without its consent. *The Siren*, 7 Wall. 152, 154; *Carr* v. *United States*, 98 U. S. 433, 437–439; *Stanley* v. *Schwalby*, 147 U. S. 508, 512; and also see pp. 518, 519, distinguishing *United States* v. *Lee*,

[1] That the United States has such power, see *United States* v. *Kagama*, 118 U. S. 375, 384–385; *United States* v. *Rickert*, 188 U. S. 433, 437; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17; *Worcester* v. *Georgia*, 6 Pet. 515, 559, 561.

106 U. S. 196. Accordingly, in *United States* v. *Colvard*, 89 F. (2d) 312 (C. C. A. 4th), a decree condemning Indian tribal lands for a highway, where the United States had not been made a party to the proceeding, was held to give no title. Compare, *Bowling* v. *United States*, 233 U. S. 528, 534–535; *Privett* v. *United States*, 256 U. S. 201, 204.

Apart from the problem of jurisdiction, the petitioner's contention must fail because it contravenes the principle that any exercise of state power, of whatever sort, must yield to a constitutional exercise of Federal power. This principle is embodied in Article VI, clause 2, of the Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

It has found expression in innumerable decisions of this Court, such as *Gibbons* v. *Ogden*, 9 Wheat. 1, 210–211; *Sanitary District* v. *United States*, 266 U. S. 405, 425–426; and *United States* v. *California*, 297 U. S. 175, 183–184. As said by Mr. Justice Holmes in the *Sanitary District* case (pp. 425–426), "This is not a controversy between equals." The power of the United States, wherever it exists, "is superior to that of the States to provide for the welfare or necessities of their inhabitants."

The contention that a State can condemn Federal lands without the consent of the United States is specifically refuted by the provision of the Constitution (Article IV, Section 3, clause 2) that Congress shall have power to dispose of and make all needful rules and regulations respecting the property of the United States, and by the repeated pronouncements of this Court that no State can affect the title of the United States or interfere with the disposal of its property. See *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404–405; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 650; *Irvine* v. *Marshall*, 20 How. 558, 563; *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *Wilcox* v. *McConnel*, 13 Pet. 498, 517. Compare *Arizona* v. *California*, 283 U. S. 423, 464; *Bunch* v. *Cole*, 263 U. S. 250, 252.

As this Court said in *Utah Power & Light Co.* v. *United States*, *supra* (pp. 404–405), the jurisdiction of the State over lands within its limits—

> does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. * * * From the earliest times Congress by its legislation, applicable alike in the States and Territories, has regulated in many particulars the use by others of the lands of the United States, * * * and has provided for and controlled the acquisition of rights of way

> over them for highways, railroads, canals, ditches, telegraph lines, and the like. The States and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its supremacy over state enactments sustained. * * *

Not only is a State powerless to condemn land held by the United States, but the United States has full power to condemn for Federal purposes land which has already been devoted to a public use by a State. *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, 685; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177; *C. M. Patten & Co.* v. *United States*, 61 F. (2d) 970 (C. C. A. 9th), reversed as moot, 289 U. S. 705; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (C. C. N. J.); *United States* v. *City of Tiffin*, 190 Fed. 279 (C. C. N. D. Ohio). See I Nichols, Eminent Domain (2d ed.), p. 113. In the *Stockton* case Mr. Justice Bradley, sitting on circuit, said (32 Fed. at p. 19):

> If it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it.

This statement was quoted with approval by this Court in *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, 656.

Petitioner relies on *United States* v. *Chicago*, 7 How. 185; *United States* v. *Railroad Bridge Co.*, 6

McLean 517, Fed. Cas. No. 16,114 (C. C. N. D. Ill.); and *Illinois Cent. R. Co.* v. *Chicago, B. & N. R. Co.*, 26 Fed. 477 (C. C. N. D. Ill.). The case first cited reserves the question, the second holds, and the third states in dictum, in an oral opinion, that a State can condemn public lands of the United States which have not been set aside for a specific Federal purpose. This Court expressed doubt as to the correctness of that doctrine in *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 161–162. In *Utah Power & Light Co.* v. *United States, supra*, these decisions were advanced as supporting the power of the State to condemn lands of the United States (243 U. S. 389, at 393), but this Court replied (p. 404):

> * * * the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired.

In any event, the lands sought to be condemned in this case have been reserved for a specific Federal purpose—the support of Indian wards of the United States—and, therefore, could not be condemned even if the doctrine of the cases cited by petitioner were accepted.

The petitioner relies also upon 19 Lands Decisions 24 (1894), a ruling by the Secretary of the Interior that a State has power to condemn allotted

Indian lands. As authority for the position taken in the ruling, the Secretary set forth a quotation which he cited as from *West River Bridge Co.* v. *Dix*, 6 How. 507. The quotation is:

> The right of taking property for public use is exercised by a state, subject to no power vested in the Federal government. The proprietary right of the United States can in no respect restrict or modify the exercise of this sovereign power by a State.

No such language is to be found in the *West River Bridge Co.* case, nor has that case any relevance whatever to the question of state condemnation of Federal lands. The quotation appears, instead, to be a slightly garbled version of one of the head notes to *United States* v. *Railroad Bridge Co.*, discussed *supra*. As has been shown, it is wholly unsupported by modern authority and is inconsistent with fundamental principles of constitutional law.

II

THE ACT OF MARCH 3, 1901, DOES NOT AUTHORIZE THE CONDEMNATION OF INDIAN ALLOTMENTS FOR HIGHWAY PURPOSES WITHOUT THE PERMISSION OF THE SECRETARY OF THE INTERIOR

It has been shown that the State cannot maintain this proceeding without the consent of the United States. As giving such consent, the State relies primarily (Br. 11–33) upon the Act of March 3, 1901, 31 Stat. 1058. That Act was the Indian ap-

propriation Act for the fiscal year 1902. The parts of the Act pertinent to this case follow the provisions dealing with appropriation. They read (31 Stat. 1083–1084):

> SEC. 3. That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices * * * through any Indian reservation * * * or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; * * * and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. * * *
>
> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory

where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

SEC. 4. That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

The petitioner urges (Br. 11–32) that paragraph 2 of Section 3, quoted above, authorizes and consents to the condemnation of allotted Indian lands for any public purpose, including highways, without the permission of the Secretary of the Interior.

The Government contends, and the Circuit Court of Appeals held (R. 86–88), that this case is controlled by Section 4. That section, it will be noted, authorizes the Secretary of the Interior to grant permission to state or local authorities "for the opening and establishment of public highways, in accordance with the laws of the State or Territory" through Indian reservations or allotted Indian lands. This provision clearly covers all acquisition of Indian lands for highways, whether by condemnation or negotiation, and requires the ac-

quiring authority to secure the permission of the Secretary for such acquisition. The words "the opening and establishment of public highways, in accordance with the laws of the State" are equally descriptive of condemnation as of negotiation. Since Section 4 thus authorizes condemnation of Indian lands for highways only with the permission of the Secretary of the Interior, paragraph 2 of Section 3 should not be interpreted as authorizing condemnation for highways without his permission, for that interpretation would make the statute self-contradictory. Rather the provision of paragraph 2 of Section 3 that allotted lands may be condemned "for any public purpose" should be taken as qualified, as regards condemnation for highways, by the more specific provision of Section 4 that Indian lands can be condemned for highways only with the permission of the Secretary.

Paragraph 2 of Section 3, as applied to condemnation for highways, prescribes the procedure to be followed after permission for the condemnation has been obtained from the Secretary under Section 4, and specifies to whom the award shall be paid. It does not override the express provision of Section 4 that the permission of the Secretary must be obtained for acquisition of Indian land for highways. It further may be that paragraph 2 of Section 3 is a blanket consent to condemnation for purposes for which the consent of the Secretary is

not elsewhere specifically required, but that is not the question here presented.

Congress has wisely made assurance that no highways or roads will be routed across the Indian lands without permitting the Secretary of the Interior to consider whether the passage contemplated by the State or private person might not unduly upset or interfere with the policy of the Federal Government with respect to the Indians left on both sides of the highway. The Secretary may also conclude negotiations settling the problems which come with the roads, including the proper compensation. Or, failing an accord on the terms of purchase, or perhaps in deference to the State's desire to take a strong title through an *in rem* proceeding rather than by purchase, he may merely approve the idea of the road, leaving the just compensation to be determined by a judicial tribunal. But in any event he must authorize the possibility and location of the highway.

And in the exercise of his best judgment with respect to the contemplated highway, the Secretary is, of course, not bound by the desires of the Indians. Congress relied upon the maturity and the experience of the Secretary to safeguard the Indians against their own lack of sagacity, and perhaps against a nearsighted inclination to convert land holdings into more liquid wealth. As this Court said in *Heckman* v. *United States,* 224 U. S. 413, 444–445:

> There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians' acquiescence. * * *

Plainly, the resolutions quoted in the Indians' brief, *amicus curiae*, can have no bearing whatever upon the issues in this case.

The petitioner argues (Br. 13–17) that paragraph 1 of Section 3 and Section 4 merely authorize the Secretary to grant easements and permits, that paragraph 2 of Section 3 grants the power to condemn without the permission of the Secretary, and that these two methods of acquiring rights of way are complementary, separate, and distinct. Paragraph 1 of Section 3 authorizes the Secretary to grant "a right of way, in the nature of an easement," for telephone and telegraph lines and offices, and does not clearly cover acquisition by condemnation, either with or without the permission of the Secretary. Section 4, however, is worded entirely differently, and, as has been shown, plainly provides for the granting of permission by the Secretary to condemn lands for highways. The petitioner's interpretation of Section 4 as limited to grants of easements and permits, and as therefore leaving the matter of condemnation wholly to paragraph 2 of Section 3, is accordingly, untenable.

In support of its interpretation the petitioner emphasizes (Br. 13–17) that paragraph 2 was added to the statute as an amendment to the original bill, but that, of course, does not mean that it is not to be read with the rest of the Act.[2]

The petitioner relies upon and quotes (Br. 18–19) from 49 Lands Decisions, 396 (1923), a ruling of the Department of the Interior that the Act of March 3, 1901, had not been repealed by certain subsequent legislation. In the course of the ruling it is stated that allotted Indian lands can be condemned for public purposes under the Act of March 3, 1901. Similar statements are found in 35 Lands Decisions, 648, 45 Lands Decisions, 563, and in the regulations of the Department of the Interior covering "Rights of Way over Indian Lands," quoted by the petitioner (Br. 19–20).

These rulings and regulations are not, it is submitted, persuasive upon the question before the Court. In the first place, the only one of them which discusses at any length the question of state condemnation of Indian lands—49 Lands Decisions 396—relies upon the earlier ruling in 19 Land Decisions 24, discussed *supra*, pp. 15–16, that lands of the United States can be condemned by a State regardless of whether the United States has consented. A departmental construction of a statute

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[2] Petitioner quotes (Br. 14–15) the full discussion which led to the adoption of paragraph 2. That discussion throws no light upon the interpretation of the paragraph.

posited upon a mistaken conception of constitutional principles is obviously not entitled to weight. Cf. *Helvering* v. *Powers*, 293 U. S. 214, 224. In the second place, in neither the rulings nor the regulations was the Department faced with condemnation for highways, and none of them mention condemnation for highways or Section 4, wherein that subject is covered. As has been indicated, the position taken in these rulings and regulations may be correct as to condemnation for purposes not specifically dealt with elsewhere than in paragraph 2 of Section 3, but that is not the question here. The same may be said of *Shell Petroleum Co.* v. *Town of Fairfax*, 180 Okla. 326, 69 P. (2d) 649, discussed by the petitioner (Br. 24–26). It deals with condemnation of land for a well for a municipal water supply, not with condemnation for a highway, and does not mention Section 4, but relies wholly upon paragraph 2 of Section 3.

III

EVEN IF THE ACT OF MARCH 3, 1901, CONSENTED UNCONDITIONALLY TO THE CONDEMNATION OF INDIAN ALLOTMENTS, THE CONDEMNATION PROCEEDING COULD BE BROUGHT ONLY IN FEDERAL COURT

It has been shown that the Act of March 3, 1901, does not consent to the condemnation of Indian trust allotments for highway purposes without the permission of the Secretary of the Interior, and that this suit cannot, therefore, be maintained.

Even if that were not so, it is the position of the Government that the United States is an indispensable party to a proceeding under the Act of 1901, that such a proceeding can, therefore, be brought only in a Federal court, and that since the present suit was brought in a state court it must in any event fail. It is, of course, well settled that if a state court lacks jurisdiction of the subject matter or of the parties to a suit, a Federal court acquires no jurisdiction by removal, even though it would have jurisdiction in a like suit originally brought there. *Goldey* v. *Morning News,* 156 U. S. 518, 523, 525–526; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.,* 258 U. S. 377, 382; *General Inv. Co.* v. *Lake Shore Ry.,* 260 U. S. 261, 268; *Venner* v. *Michigan Central R. R. Co.,* 271 U. S. 127, 131.

1. *The United States is an indispensable party to this proceeding*

Since the petition in condemnation recites that the fee of the lands sought to be condemned is held in trust by the United States for Indian allottees (R. 3–10), there can be no doubt that the United States is an indispensable party to this proceeding, unless Congress has provided otherwise. *Bowling* v. *United States,* 233 U. S. 528, 534–535; *Privett* v. *United States,* 256 U. S. 201, 204; *Sunderland* v. *United States,* 266 U. S. 226, 232; *United States* v. *Colvard,* 89 F. (2d) 312 (C. C. A. 4th). See *Heckman* v. *United States,* 224 U. S. 413, 437–439, 444–

446. Compare *Laveirge* v. *Davis,* 166 Minn. 14, 206 N. W. 939, cert. denied, 273 U. S. 714. And, it is submitted, paragraph 2 of Section 3 of the Act of 1901 does not, either expressly or by necessary implication, waive the necessity that the United States be made a party to a proceeding to condemn Indian allotments, even if it be assumed that that section provides for condemnation for highways without the consent of the Secretary of the Interior.

Paragraph 2 of Section 3 provides that allotments may be condemned "under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned". The phrase "in the same manner as land owned in fee may be condemned" obviously means by the same procedure which is followed when land owned in fee is condemned. It does not mean that the United States—the holder of the legal title to the land and the guardian of the Indian holder of the equitable interest—is to be ignored in the proceeding. Furthermore, the final proviso of the paragraph, "and the money awarded as damages shall be paid to the allottee," clearly recognizes that both the United States and the allottee are to be parties to the proceeding, for if the allottee were to be the only party it would be needless to provide that the award should be paid to him. Again, even if procedure, as to which state law controls, includes the question of necessary parties, the Minnesota law

requires that the petition in condemnation name, and that notice be served upon, "all persons appearing of record or known to the petitioner to be the owners" of the property. 2 Okla. Stat. (Mason, 1927), § 6541. The petitioner, proceeding under this statute, did in fact join the United States as a party in this case (R. 1).

The petitioner argues (Br. 32) that because paragraph 2 of Section 3 does not specifically consent that the United States be made a party to the condemnation proceedings it authorizes it must be inferred that that paragraph makes it unnecessary that the United States be made a party. The same argument is advanced in *Shell Petroleum Co.* v. *Town of Fairfax*, 180 Okla. 326, 329, 69 P. (2d) 649. The more reasonable inference, it is submitted, is that paragraph 2 of Section 3 does consent that the United States be made a party.

It is utterly unreasonable to suppose that Congress intended to withdraw from Indian allottees the protection of representation of their interest by the United States in suits for the condemnation of their allotments. The fee of the Indian allotments involved in this suit is held in trust by the United States for the allottees.[8] By the very act of issuing

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[8] The Act of January 14, 1889, 25 Stat. 642, 643, provided for the allotment of these particular lands, allotment to be made in conformity with the Act of February 8, 1887, 24 Stat. 388, known as the General Allotment Act. The latter Act (Sec. 5) provided for a 25-year trust period, the President to have power to extend the period. The original trust periods on the allotments here involved were in fact ex-

trust patents the United States recognized that these Indians were not capable of managing their own affairs; that they had not sufficient business judgment to be trusted with absolute ownership. See *Heckman* v. *United States*, 224 U. S. 413, 444, quoted *supra*, p. 21. Even in the case of the Five Civilized Tribes, where the United States had issued patents in fee to Indians, but had restricted their power to alienate the land, this Court held that no judgment entered in a suit to which the United States is not a party could affect title to the land. *Bowling* v. *United States*, 233 U. S. 528, 534–535; *Privett* v. *United States*, 256 U. S. 201, 204. Congress has since removed the barrier raised by those decisions, but it did so by providing that the United States might be joined in such suits, not that it need not be made a party. Act of April 10, 1926, c. 115, Sec. 3, 44 Stat. 239. The United States has retained greater control of the allotments involved in this case than it did of allotments to Indians of the Five Civilized Tribes; not merely is the power of alienation restricted, but the fee itself is held by the United States.

Less than a month before the Act of March 3, 1901, was passed, Congress indicated that it intended that the United States should retain a close

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tended from time to time by executive orders, although that does not appear in the record except as it is to be inferred from the fact that these allotments are still held in trust by the United States. The Act of June 18, 1934, 48 Stat. 984, known as the Indian Reorganization Act, extended the trust period on all Indian allotments indefinitely.

supervision over Indian trust allotments. By the Act of February 6, 1901, 31 Stat. 760, a prior Act which permitted Indian claimants to trust allotments to sue to establish their rights was amended to require specifically that the United States be joined as a party defendant to such suits. In *McKay* v. *Kalyton*, 204 U. S. 458, this Court said of the amendment (p. 469):

> Nothing could more clearly demonstrate, than does this requirement, the conception of Congress that the United States continued as trustee to have an active interest in the proper disposition of allotted Indian lands and the necessity of its being made a party to controversies concerning the same, for the purpose of securing a harmonious and uniform operation of the legislation of Congress on the subject.

It cannot be said that Congress thought that the States would adequately protect the interests of Indian allottees in condemnation suits. The supposed permission to condemn does not extend merely to States but to anyone empowered to condemn under state law. While it might have been hoped that the States would themselves protect the interests of Indians in condemnation suits which they brought, such a hope could hardly have been entertained as to everyone authorized to condemn under any state law.

Nor could the United States adequately protect Indian allottees, in suits to condemn their allotments, even if it need not be joined as a party itself,

by furnishing them legal assistance. Many such suits would never come to the attention of the United States at all if it were not joined as a party defendant. Treaties or statutes providing for the cession of Indian lands to the United States, and for the removal of the tribe elsewhere, have usually provided that individual Indians who so chose could select an allotment from the ceded lands and remain behind. That was, in fact, the origin of the allotments in this case. See Act of January 14, 1889, sec. 3, 25 Stat. 642, 643. Allotments of such origin are widely scattered, and often the United States would have no notice whatever of suits to condemn them unless, as was done in this case, it was made a party to the suit.

2. *This proceeding could not be brought against the United States in a state court*

The Act of March 3, 1901, does not specify where the condemnation proceedings it authorizes must be brought; it provides that state law shall control as to procedure, but says nothing as to the forum in which the proceeding must be initiated. In *Shell Petroleum Corp.* v. *Town of Fairfax, supra,* 180 Okla. at 329, the court considered that the provision that the lands be condemned for any public purpose under the laws of the State in the same "manner" as land owned in fee constituted an adoption of the same court and the same procedure. It is submitted that the word "manner," like its

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synonym "mode," refers merely to the procedure utilized in the state proceedings. There is certainly nothing anomalous about utilizing the state procedure in the Federal courts, for that is the established course utilized with respect to condemnation by the United States. Act of August 1, 1888, c. 728, Secs. 1, 2, 25 Stat. 357, 40 U. S. C., Secs. 257, 258. Since the Act is silent on the point, it should, the Government contends, be interpreted as consenting to condemnation proceedings only in the Federal courts, and not in the state courts.

That the Act should not be interpreted as consenting that the United States be sued in state courts follows, in the first place, from the principle that Acts consenting to suits against the United States are to be strictly construed. See *Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 686:

> The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language requires.

See also *United States* v. *Michel,* 282 U. S. 656, 659.

In the second place, it is almost unknown for Congress to consent that the United States be sued in a state court. In *Stanley* v. *Schwalby,* 162 U. S. 255, wherein the Court distinguished *United States* v. *Lee,* 106 U. S. 196, this Court said (p. 270):

> The United States, by various acts of Congress, have consented to be sued in their own

> courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case.

To the same effect, see *United States* v. *Inaba*, 291 Fed. 416, 418 (E. D. Wash.); *United States* v. *Deasy*, 24 F. (2d) 108, 110 (D. Idaho); *Cowperthwaite* v. *Wallworth*, 105 N. J. Eq. 657, 149 Atl. 353; Hughes, Federal Practice (1931), Sec. 363.

The position for which we contend is in no way weakened by *United States* v. *Bank of New York Co.*, 296 U. S. 463, involving state proceedings for the liquidation of Russian insurance companies, and holding that the United States should file its claims against the assets of such companies in the state proceedings. This Court was careful to point out that the United States "would be an actor—voluntarily asserting what it deemed to be its rights—and not a defendant" (p. 480). The *ratio decidendi* of the decision was "that the United States is free to *invoke* the jurisdiction of the state court for the determination of its claim, * * *" (p. 479; italics added). The decision in no way modifies the settled doctrine that statutes expressing the consent of the United States to be sued must be strictly construed.

Indeed, our position is supported by the fact that in cases where the United States would have been forced to litigate its rights in the state court as party defendant, it has uniformly been held that the United States need not intervene in pending litigation in state courts to protect its property

interests, but may bring suit in the Federal courts to protect those interests, irrespective of pending state court suits. *United States* v. *Babcock*, 6 F. (2d) 160 (D. Ind.), mod. 9 F. (2d) 905 (C. C. A. 7th); *United States* v. *McIntosh*, 57 F. (2d) 573, 578 (E. D. Va.), cited as controlling in its companion case, *Prince William County* v. *United States*, 79 F. (2d) 1007 (C. C. A. 4th), certiorari denied, 297 U. S. 714; *United States* v. *Deasy*, *supra*.

In the only two instances which we have found of consent by Congress that the United States be sued in state courts, each of the statutes names state courts specifically, provides for service upon the United States, and provides that any suit brought under it may be removed by the United States to a Federal court. See Act of April 10, 1926, c. 115, 44 Stat. 239; Act of March 4, 1931, c. 515, 46 Stat. 1528.[4]

It is submitted, therefore, that the Act of 1901 should not be construed as consenting to suit in state courts.[5]

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[4] The first of these Acts is the statute, referred to *supra*, p. 27, providing for joining the United States in suits respecting restricted lands of Indians of the Five Civilized Tribes. The second Act consents that the United States be named a party in suits for the foreclosure of a lien upon real estate, for the purpose of securing an adjudication as to any lien the United States may have on the property.

[5] Regulation 69½ of the Regulations of the Department of the Interior, "Concerning Rights of Way over Indian Lands," adopted in the general revision of April 7, 1938, provides: "As the holder of the legal title to allotted Indian

IV

THE ACT OF MARCH 3, 1901, INSOFAR AS IT DEALT WITH THE CONDEMNATION OF INDIAN LANDS, WAS REPEALED BY THE INDIAN REORGANIZATION ACT

The Government has shown that the Act of March 3, 1901, did not authorize the condemnation of Indian lands for highway purposes without the permission of the Secretary of the Interior, and, in any event, did not purport to confer jurisdiction upon state courts in such proceedings. It further contends that the Act of March 3, 1901, insofar as it dealt with the condemnation of Indian lands, whether for highway or other purposes, was repealed by the Indian Reorganization Act.

The Act of June 18, 1934, 48 Stat. 984, known as the Indian Reorganization, or Wheeler-Howard Act, is set out in full in the Appendix, *infra*, p. 49. The provisions of the Act which, the Government contends, repealed any authorization in the Act of March 3, 1901, for the condemnation of Indian lands are found in paragraph 2 of Section 3 and in Section 4. They read:

> SEC. 3.
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> * * * * *
>
> Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; * * *

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lands held in trust, the United States must be made a party to all such condemnation suits and the action must be brought in the appropriate federal district Court, the *procedure*, however, to follow the provisions of the State law on the subject, so far as applicable."

> SEC. 4. Except as herein provided, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: * * *

The words of Section 4, "Except as herein provided, no sale, devise, gift, exchange, *or other transfer* of restricted Indian lands * * * shall be made or approved" plainly include condemnation of Indian lands as well as other modes of transfer. Any doubt on that score is eliminated by the proviso in paragraph 2 of Section 3 of the Indian Reorganization Act that "Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way." For this explicit reservation of one method by which rights of way across Indian lands might be acquired plainly indicates that no other method was meant to survive.

That the Indian Reorganization Act repealed the Act of March 3, 1901, as regards condemnation of Indian lands, is shown not only by the phraseology but by the basic purpose of the Indian Reorganization Act. That purpose, as stated by its co-authors, Senator Wheeler and Congressman Howard, was to stop the alienation of Indian lands. (See 78 Cong. Rec. pp. 11123, 11726, 11727.) Further allotment of lands to Indians in severalty was forbidden (Sec. 1), existing trust periods were extended indefinitely (Sec. 2), surplus reservation lands were to be restored to tribal ownership (Sec. 3), all transfer of Indian lands, with exceptions not here material, was forbidden (Sec. 4), and money was appropriated for the acquisition of additional lands for Indians (Sec. 5). This Act completely reversed the policy which had theretofore been in effect, and which was in effect when the Act of March 3, 1901, was adopted. See Annual Report of the Secretary of the Interior, 1933, p. 108; and, generally, Kinney, A Continent Lost—A Civilization Won: Indian Land Tenure in America (1937), especially p. 311. Thus both the words and policy of the Indian Reorganization Act plainly supersedes the condemnation provisions of the Act of March 3, 1901.

The petitioner argued in the court below[6] that because the state commissioner of highways had

[6] The question of repeal of the Act of March 3, 1901, by the Indian Reorganization Act has not been briefed by the petitioner in this Court.

definitely located the right of way of the road for which the lands are here sought before the Indian Reorganization Act was passed, that Act could not affect the right to maintain the present proceeding. Presumably, it was meant to contend that the lands were taken when the commissioner located the right of way, and that title passed at that time. The Minnesota decisions are, however, clear that the location order of the commissioner did not vest title in the State, and constituted merely a "preliminary step" looking toward the acquisition of the property. *State* v. *Erickson,* 185 Minn. 60, 63, 239 N. W. 908 (overruled on other points in *State* v. *Stanley,* 188 Minn. 390, 247 N. W. 509); *State* v. *Lesslie,* 195 Minn. 408, 263 N. W. 295. Under the Minnesota decisions title to land condemned does not pass until the final award is fully paid, although, as a matter of convenience, damages are computed upon the assumption of a taking as of the time of the filing of the award of the compensation commissioners. *City of Minneapolis* v. *Wilkin,* 30 Minn. 145, 15 N. W. 668; *Ford Motor Co.* v. *City of Minneapolis,* 147 Minn. 211, 215, 179 N. W. 907. It is clear, therefore, that the repeal of the Act of 1901 by the Indian Reorganization Act was effective to bar this proceeding.

V

THE TREATY OF SEPTEMBER 30, 1854, BETWEEN THE UNITED STATES AND THE CHIPPEWA INDIANS DOES NOT AUTHORIZE THE STATE TO TAKE THE LANDS HERE SOUGHT

The petitioner contends (Br. 33–36) that it is authorized to take the lands sought to be condemned in this proceeding by the treaty between the United States and the Chippewa Indians of September 30, 1854, 10 Stat. 1109. That treaty provides:

> ARTICLE 3. * * * [the President] may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

It is the final sentence upon which the petitioner relies.

There are several reasons why this provision has no relevance to the present case.

1. The treaty dealt with rights only as between the Chippewas and the United States; it did not grant to States or to private interests rights as against both. The phrase "compensation being

made therefor as in other cases," upon which the petitioner particularly relies (Br. 33), when viewed in the light of the provision immediately preceding it, plainly means that compensation shall be made by the President by assigning to the Indians other lands in lieu of any taken for rights of way, and not, as the petitioner assumes, that compensation shall be made as in other condemnation proceedings.

2. The Treaty of 1854, including the provision as to rights of way, was probably repealed as regards the Grand Portage Reservation (in which the lands here sought lay) by the Act of January 14, 1889, c. 24, 25 Stat. 642, which provided for the cession to the United States of the Grand Portage Reservation, the right being reserved to individual Indians who so chose to take allotments from the ceded lands.[1]

3. If the Treaty of 1854 ever had any bearing upon the right of the State to condemn Indian lands, and if it was not repealed by the Act of January 14, 1889, it clearly was repealed by the Act of March 3, 1901 (31 Stat. 1058), discussed *supra*, p. 16 *et seq.*

[1] The petitioner consistently speaks of the Act of January 14, 1889, as approving the Treaty of 1854 (Br. 7, 8–9, 33). The statute does not mention the treaty and it is difficult to see why the petitioner refers to it as approving the treaty, unless the petitioner is under the misapprehension that the treaty was not valid unless ratified by an Act of Congress.

Both the petitioner and the United States agree that the Act of March 3, 1901, fully covers the subject of condemnation of allotted Indian lands for highways; the petitioner contends that the Act expressly grants the right to condemn, while the United States contends that the Act expressly makes the permission of the Secretary of the Interior a prerequisite to any such condemnation. Whichever interpretation is correct, the Act of 1901 fully covers acquisition of Indian lands for highways.

4. If the treaty provision had not theretofore been repealed by implication, it was repealed by the Indian Reorganization Act, discussed, *supra*, p. 33 *et seq.*

VI

THE STATE HAS NO POWER TO CONDEMN PARCEL 5 OF THE LANDS HERE SOUGHT, BECAUSE IT IS TRIBAL LAND

The Government has shown that the Act of March 3, 1901, did not consent to the condemnation of allotted Indian lands for highway purposes without the permission of the Secretary of the Interior, and that, insofar as it dealt with condemnation, that Act was, in any event, repealed by the Indian Reorganization Act. Even if both of these contentions are unsound, however, the State would still have no power to condemn Parcel 5 of the lands sought in this proceeding, because that tract is tribal land.

Parcel 5 was formerly owned by Quodonce, an Indian allottee, but was conveyed by him to the United States in trust for the Grand Portage Band of Chippewa Indians (R. 47–55); see *supra*, p. 5. There can be no contention that the Act of March 3, 1901, consents that Indian tribal lands be condemned without the permission of the Secretary of the Interior; paragraph 2 of Section 3 applies only to allotted lands, and Section 4, which applies both to allotted and tribal lands, makes the permission of the Secretary of the Interior a prerequisite to acquisition. See *United States* v. *Colvard*, 89 F. (2d) 312, 314–315 (C. C. A. 4th). By the conveyance to the United States in trust for the tribe, Parcel 5 was, therefore, withdrawn from the operation of paragraph 2 of Section 3 of the Act of March 3, 1901, and ceased to be subject to condemnation by the State.

The petitioner contended in the courts below, however, and the District Court held (R. 65), that because the conveyance of Parcel 5 from Quodonce to the United States in trust for the tribe was made with notice of the pendency of the condemnation proceeding, it could not affect the right of Minnesota to condemn the parcel.*

It is conceded that on February 20, 1936, when the United States accepted the Quodonce option of January 22, 1936, it had notice of the present condemnation proceeding, filed February 6, 1936. It

* The petitioner has not briefed this question in this Court.

had been served as a party (R. 21–22) and a notice of *lis pendens* had been filed (R. 38). But to contend that for that reason the conveyance was ineffective to terminate any right possessed by the State to condemn the conveyed land is to overlook fundamental and well established principles of law.

As shown by the discussion, *supra*, p. 11 *et seq.*, paragraph 2 of Section 3 of the Act of March 3, 1901, assuming that it consents that allotted Indian lands be condemned, does two things: it removes the jurisdictional barrier inherent in the fact that a suit to condemn Indian lands must be brought against the United States, which cannot be sued without its consent, and it removes the substantive barrier that such lands cannot be acquired without the consent of the United States. By withdrawing Parcel 5 from the operation of paragraph 2 the United States restored both barriers: it withdrew its consent to be sued with respect to that parcel, and it withdrew its consent that that parcel be acquired. Under the decisions of this Court the United States had full power to do either or both, regardless of pending litigation, at any time before title to the parcel passed from it. That title has not passed in this case is shown, *supra*, p. 36.

The United States may at any time withdraw its consent that it be sued. See *Lynch* v. *United States*, 292 U. S. 571, 581–582; *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 119; *Perry* v. *United States*, 294 U. S. 330, 360 (concurring opinion). As said in the *Lynch* case (pp. 581–582):

> * * * consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration [citing cases].

Consent to sue the United States may be withdrawn even after suit has been brought. See *De Groot* v. *United States,* 5 Wall. 419, 432; *Kogler* v. *Miller,* 288 Fed. 806, 808 (C. C. A. 3d); *Synthetic Patents Co.* v. *Sutherland,* 22 F. (2d) 491, 494 (C. C. A. 2d); *Imhoff-Berg Silk Dyeing Co.* v. *United States,* 43 F. (2d) 836, 841 (D. N. J.). Compare *Gordon* v. *United States,* 7 Wall. 188, 195. Similarly, a State may withdraw its consent even after suit has been brought, although, unlike the United States, States are subject to the obligation of contracts clause. See *Beers* v. *Arkansas,* 20 How. 527, 529–530; *Hans* v. *Louisiana,* 134 U. S. 1, 17. There can, accordingly, be no doubt that Congress had power to withdraw its consent that the present proceeding be brought against the United States, as to part or all of the land sought to be condemned, even after the proceeding had been commenced and the *lis pendens* filed.

Looking at the question in its substantive aspect, neither is it doubtful that the United States had power to withdraw its consent to the acquisition of Parcel 5. The United States had not entered into a contract with the State to sell it the land. It had

merely conferred upon the State a privilege to acquire the land, and that privilege it could withdraw at any time before the State had actually acquired it. Compare *The Yosemite Valley Case*, 15 Wall. 77, 87; *Frisbie* v. *Whitney*, 9 Wall. 187; *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474.

Even if Parcel 5 had been ordinary privately owned land when this proceeding was started, it would not follow that the United States could not, by purchasing the land, have withdrawn it from the State's power to condemn. As shown *supra*, p. 14, the United States can condemn even land owned by a State. If it could condemn Parcel 5 after it was acquired by the State, why would not purchase pending condemnation be effective to defeat condemnation?[9] But whatever view might be taken as to the effect of a purchase by the United States of ordinary privately owned lands during the pendency of a proceeding by a State to condemn them, it is clear that the United States can defeat, at any time before title is taken, a condemnation proceeding by a State to condemn lands of the

[9] It may be that if the United States buys a claim to land, the title to which is in litigation, with notice of the litigation, the United States takes subject to the outcome of the litigation. It has been so held. *United States* v. *Mayse*, 5 F. (2d) 885 (C. C. A. 9th); see *Ward* v. *Congress Construction Co.*, 99 Fed. 598 (C. C. A. 7th). In such a case it would be undesirable that purchase by the United States during litigation should defeat a claimant's attempt to establish his title. That consideration is, however, not applicable to this case. The State is not seeking to clear its title, but to acquire the title of the Indians and the United States.

United States. And that is all that is involved here. Under the Minnesota law the State, providing it does not take possession, is free to abandon the proceeding at any time before the final award of the commissioners, or, if appeal is taken, at any time before the final judgment of the court. *State* v. *Lesslie,* 195 Minn. 408, 263 N. W. 295; *Fletcher* v. *Chicago, St. P., M. & O. Ry. Co.,* 67 Minn. 339, 69 N. W. 1085; *Minneapolis-St. P. Sanitary Dist.* v. *Fitzpatrick,* 197 Minn. 275, 266 N. W. 848. It is no more unfair for the United States to make use of its right to terminate the proceeding than it would be for the State to exercise its undoubted right to do so.

CONCLUSION

A State cannot, without the consent of the United States, condemn lands held by the United States in trust for individual Indians or for an Indian tribe. The Treaty of September 30, 1854, if it ever authorized condemnation by States or private interests, has been superseded by subsequent legislation. The Act of March 3, 1901, requires the permission of the Secretary of the Interior for the condemnation of tribal lands for any purpose, and Parcel 5 of the lands here sought is now tribal land. That Act likewise requires the permission of the Secretary of the Interior for condemnation of allotted lands for highway purposes, and in any event it was repealed, insofar as it dealt with condemnation, by the Indian Reorganization Act of 1934. It is sub-

mitted, therefore, that the judgment of the Circuit Court of Appeals should be affirmed in its entirety; that whatever view is taken as to the interpretation of the Act of March 3, 1901, and of the Indian Reorganization Act, the judgment below should be affirmed as to Parcel 5.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

CARL MCFARLAND,
Assistant Attorney General.

MAC ASBILL,
Special Assistant to the Attorney General.

OSCAR PROVOST,
THOMAS HARRIS,
Attorneys, Department of Justice.

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APPENDIX

Treaty with the Chippewas, Sept. 30, 1854, 10 Stat. 1109, 1110:

ARTICLE 3. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083:

SEC. 3. That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules

and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this Act: *Provided*, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction thereof; and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities.

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

SEC. 4. That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

Text of the Indian Reorganization, or Wheeler-Howard, Act of June 18, 1934, c. 576, 48 Stat. 984:

AN ACT To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created on set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any land so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: *Provided further,* That the order of the Department of the Interior signed, dated, and approved by Honorable

Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further,* That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost of said improvements: *Provided further,* That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further,* That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further,* That patentee shall also pay into the Treasury of the United States to the credit of the Pa-

pago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

SEC. 4. Except as herein provided, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided further,* That the Secretary of the Interior may authorize voluntary exchanges

of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided,* That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H. R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H. R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided,* That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior,

in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

SEC. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided,* That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, with-

out regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: *Provided*, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat. L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat. L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat. L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years,

and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revo-

cable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the con-

duct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

SEC. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved June 18, 1934.

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